Filed 6/23/09 Beek v. City of Newport Beach CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALLAN BEEK, Plaintiff and Appellant, v. CITY OF NEWPORT BEACH et al., Defendants and Respondents, WILLIAM P. FICKER et al., Interveners and Respondents.	G041074 (Super. Ct. No. 07CC12177) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Peter J. Polos, Judge. Affirmed.

Law Offices of Everett L. DeLano III, Everett L. DeLano III and M. Dare DeLano for Plaintiff and Appellant.

Reed & Davidson, Dana W. Reed, Stuart L. Leviton, Bradley W. Hertz; Office of the City Attorney City of Newport Beach, David R. Hunt and Aaron C. Harp for Defendants and Respondents.

Wewer & Lacy and James V. Lacy for Interveners and Respondents.

* * *

In February 2008, after a spirited campaign, the voters in the City of Newport Beach (City) decided, by a 53 percent to 47 percent margin, to approve an initiative charter measure requiring that a new city hall be located next to the library in a four-acre portion of a 12-acre city-owned property in Newport Center. The City had acquired the property from the Irvine Company as part of a development agreement.

This appeal stems from an action by the ballot measure's opponent to invalidate the initiative measure. The opponent primarily argues that the initiative violates the rule against diversion by contradicting limitations placed upon the use of the property for dedicated open space. The opponent also argues that the initiative improperly delegated to the city council the task of amending the general plan, was an illegal administrative act, and was approved by a misinformed public.

We disagree, and affirm the judgment on the pleadings for the City. Our de novo review is circumscribed by the long-standing rule of broad deference to the electorate's power to enact laws and charter amendments by initiative. Voters not only have the right to use the power of the initiative and referendum to fight city hall, but also to decide where it should be located.

I

FACTUAL AND PROCEDURAL BACKGROUND

Newport Center is a major regional center located on a high bluff overlooking Newport Harbor. It includes Fashion Island, an upscale, open-air shopping mall.

In 1993, the City and the Irvine Company entered into a development agreement (the 1993 Development Agreement) involving land use and traffic circulation on approximately 250 acres of the Irvine Company's undeveloped land in the City, including land at Newport Center. The 1993 Development Agreement called for the Irvine Company to dedicate separate pieces of property to the City in fee simple, subject to specified conditions and restrictions in the applicable planned community regulations.

These planned community regulations contemplated that a 12-acre unimproved eastern portion of the property (bounded by the main library to the south and MacArthur Boulevard on the east) would be for open space use, including a four-acre public park.[1]

The City and the Irvine Company could amend or cancel the 1993 Development Agreement by "mutual written and executed consent of the Parties . . . ." The Irvine Company retained the right "to waive any and all of the reservations or covenants with respect to any parcel to be dedicated so long as the proposed use of the property is consistent with the [Planned Community] text."

In 1999, the City, by resolution, accepted the open space dedication and directed the city clerk to record it as an "open space parcel." But, through an administrative oversight, the Irvine Company remained on the deed for nearly another decade.[2]

In November 2007, the Irvine Company signed a grant deed conveying the property to the City. The grant deed permitted the use of the property "for open space and *public facilities* uses" consistent with the applicable planned community district regulations. (Italics added.) The grant deed expressly authorized the Irvine Company and the City to amend the covenants upon written agreement.

In 2007, various City residents, including interveners William P. Ficker, Jack Croul and Marion Bergeson, qualified an initiative measure (Measure B) to amend

---

[1] Exhibit F, the "Open Space Dedication Conditions," stated that the Irvine Company would convey the parcels "subject to the following reservations and covenants . . . (3) covenants that the parcel(s) will be used consistent with the [permitted uses], that the Company will have the right to review and comment on park plans and improvement plans, . . . that the City will maintain the lands in a safe and attractive condition, and that the City will not abandon the conveyed parcels nor transfer them to a third party for any development purpose."

[2] We take judicial notice of the documents attached to Beek's request for judicial notice, filed on February 8, 2009, of various official City documents relating to the use of dedication and use of the 12-acre parcel that is the subject of this appeal.

the City charter to require that any new city hall be located in this open space parcel. Plaintiff Allan Beek (Beek) was a principal opponent of Measure B and one of the persons who submitted the ballot argument against the initiative.

While Measure B was pending, the City and the Irvine Company entered into a zoning implementation agreement that recognized the possible passage of Measure B. The Irvine Company agreed to cooperate in good faith with the City to release and terminate any use restrictions contained in the deed for the property "to allow for and accommodate construction of a new City Hall on that site."

In May 2008, the Irvine Company executed and delivered to the City an amended grant deed for the property. The Irvine Company expressly acknowledged "City's election to so construct a new City Hall on the Property," but reserved the right to review and comment upon any proposed improvements and design plan within a specified time frame. In turn, the City committed to give "reasonable consideration" to the Irvine Company's suggestions.

Beek filed his petition for writ of mandate before the election to enjoin Measure B from the ballot. The trial court denied Beek's ex parte application for a temporary restraining order.

Newport Beach voters approved Measure B at the February 2008 election under the printed ballot title "Newport Beach, City Hall in the Park." There were 16,938 "yes" votes and 15,092 "no" votes.

In the spring of 2008, Beek filed a first amended petition (the operative pleading). In July 2008, the City, joined by the interveners, filed a motion for judgment on the pleadings. The City requested the trial court take judicial notice of the 1993 Development Agreement, the zoning implementation agreement and the original and amended grant deeds, and pertinent provisions of the City charter. In opposition, Beek requested the trial court take judicial notice of the 1999 City resolution accepting

dedication of the property as open space, and various provisions of the municipal code relating to open space districts.

The trial court heard and granted the motion for judgment on the pleadings. Beek filed a timely notice of appeal.

II

DISCUSSION

A. *We Deferentially Review the Electorate's Right to Exercise Their Reserved Local Initiative Power to Amend a City Charter*

We review de novo the trial court's judgment on the pleadings, but, in so doing, we are mindful of the "extraordinarily broad deference" we give to the local electorate's power to enact laws by initiative. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 573-574 (*Pala*).) The electorate's right to exercise the power of the initiative and the referendum in land use and planning measures is "generally co-extensive with the legislative power of the local governing body." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775 (*DeVita*).) We will uphold an initiative measure involving legislative land use measures so long as "'reasonable minds might differ as to the necessity or propriety of the enactment.'" (*Pala*, *supra*, 54 Cal.App.4th at p. 574.)

The decision where to locate a city hall is a legislative decision that is subject to the initiative and referendum. Beek contends that Measure B involves an administrative rather than a legislative act because the city council already had established a process for selecting the location for a new city hall. But Measure B effectively countermanded this legislative decision, thereby constituting another legislative act.

Numerous cases have held that selecting the seat of government is a quintessential legislative act. "It seems to be settled in California that the selection and designation of a city hall site, and the steps incident to the determination that a city hall

should be erected on the selected site, are legislative acts subject to referendum." (*Burdick v. City of San Diego* (1938) 29 Cal.App.2d 565, 566; see also *Knowlton v. Hezmalhalch* (1939) 32 Cal.App.2d 419.)

In *Hopping v. City of Richmond* (1915) 170 Cal. 605, the California Supreme Court rejected a similar argument that city council resolutions to acquire and construct a new city hall building were administrative acts not subject to a voter referendum. "That such matters have been understood, from the beginning of our state history, to be within the legislative power is manifest from an examination of our voluminous statutes. The legislature has enacted statutes fixing the location of the state capital at Vallejo, at Benicia, and at Sacramento, successively. It has enacted statutes to provide for the construction of a state capitol building and for remodeling the same, and for state buildings in San Francisco. . . . These comprise but a small part of legislative acts in the form of statutes which our legislature has enacted in pursuance of legislative power of this character. They each declare a public purpose, the purpose of locating the public building, or of locating the public place or institution, or of establishing such institution." (*Id.* at p. 612.) The court recognized that "strenuous public controversies" frequently arise over propositions to erect public buildings, and it accepted the voters' right, through the initiative and referendum, to make such legislative decisions. (*Id.* at p. 617.)

Simpson v. Hite (1950) 36 Cal.2d 125, cited by Beek, is distinguishable. The Supreme Court invalidated a proposed county initiative ordinance concerning the location of a county courthouse for Los Angeles County because "the legislative policy [concerning where to locate and build courthouses] has been expressly fixed by the state itself, and the execution of that policy has been specifically imposed by the state law on the board of supervisors as an administrative function. It would be beyond the powers of a board of supervisors to repeal or amend the state-declared policy; likewise, it is beyond

the powers of the electorate of Los Angeles County by initiative procedure to repeal or amend such state policy." (*Id.* at p. 131.)

No such state policy is involved here. Where to locate the Newport Beach city hall is purely a local matter, and the voters are entitled to weigh in on the subject.

B *Measure B Does Not Violate the Dedication of Newport Center Park as Open Space*

Beek contends the City's public dedication of the subject land in 1999 as dedicated open space precludes the voters from modifying the dedication. In his view, the 1999 dedication for open space purposes passed a fee simple interest to the City, barring the Irvine Company from subsequently consenting to a different use: "While the Irvine Company and the City did agree the [1993 Development Agreement] could be amended, [t]he Irvine Company had no rights to control the property once the dedication was accepted."

Beek is wrong. California law gives municipalities wide latitude to alter the use of dedicated lands, subject to enforceable restrictions imposed by the grantors. Here, the pertinent documents between the Irvine Company and the City make clear that the parties reserved the right to mutually consent to refine the original dedication as open space, and did agree to allow for a "public facilities" use, specifically including a city hall.

Simons v. City of Los Angeles (1976) 63 Cal.App.3d 455 is instructive. In *Simons*, a parks advocate sought to enjoin the City of Los Angeles from using part of Elysian Park, a dedicated public park, for a police academy. Voters had approved a charter amendment to allow this use. The appellate court, affirming an order sustaining the city's demurrer, held the authorization of a police academy in the park to be a valid use of the dedicated parkland: "A charter city has inherent authority to control, govern and supervise its own parks. '[T]he disposition and use of park lands is a municipal affair [citations] and a charter city "has plenary powers with respect to municipal affairs

not expressly forbidden to it by the state Constitution or the terms of the charter." . . . [¶] Accordingly, it is permissible for a city to build a courthouse in a public park since the city '"may deal with such a park to which it holds title in fee, as it sees fit, subject only to the limitations and restrictions of its own charter. If the charter is silent on the matter of abandonment or change in use of such park, that power nevertheless inheres in such a municipality."' [Citation.]" (*Id.* at p. 468.)

As *Simons* recognizes, there is an exception where the park land is acquired by private deed. California courts will enforce deed restrictions limiting the use of donated land for specific uses and will preclude a city from diverting the use of the donated property to inconsistent uses. (*County of Solano v. Handlery* (2007) 155 Cal.App.4th 566, 573 [enforcing deed restriction limiting use of land to county fair, public park or recreational area].) "With deeds, as with all contracts, the primary object of interpretation is to ascertain and carry out the intention of the parties." (*Ibid.*)

Beek argues that the Irvine Company, once having attached use restrictions to its land conveyance, can never subsequently alter these restrictions: "If the dedication was complete by their acts, whether express or implied, it was thereafter irrevocable by them, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on their part." (*Slavich v. Hamilton* (1927) 201 Cal. 299, 306 [private dedication to city of land "*forever* for the purpose of a public water park" precludes later use for veterans' memorial building] (*Slavich*).)

However, as subsequent cases interpreting *Slavich* have explained, the scope of a private dedication presents an issue of contractual interpretation and the objective intent manifested by the parties involved in the transaction. "[A] dedication must be understood and construed with reference to its primary object and purpose. . . . The real question always is, therefore, whether the use in a particular case, and for a designated purpose, is consistent or inconsistent with such primary object. Whether or not a particular use amounts to a diversion from that for which the dedication was made

depends on the circumstances of the dedication and the intention of the party making it." (*Wattson v. Eldridge* (1929) 207 Cal. 314, 320 [private dedication of land to city for use "only for permanent waterways and canals" does not preclude city from later using the land for a public roadway].)

Here, there can be no question of the parties' intent in dedicating the 12-acre parcel to the City. The amended grant deed, the controlling legal document, unambiguously permits the use of a portion of the property for a city hall. This potential use also was recognized in the zoning implementation agreement. Indeed, as far back as the 1993 Development Agreement, the parties reserved the right to amend any prior use restrictions by mutual consent. We see nothing in any of the governing documents to restrict the power of the electorate to locate their city hall within designated open space property.

C. *Measure B Does Not Violate Limitations in the City's General Plan*

Beek correctly recognizes that Measure B amends neither the City's general plan nor its zoning laws. Indeed, as a charter amendment, Measure B supersedes any conflicting provisions of the general plan or the municipal code. It directs the City to amend its applicable land use planning regulations, including the general plan "in order to implement this initiative and to ensure consistency and correlation between this initiative and other elements of the [general plan] and [municipal code]. This enabling legislation shall be interpreted broadly to promote the requirement that a general plan constitute an integrated and consistent document."

The court in *Pala*, *supra*, 54 Cal.App.4th 565, upheld a similar consistency clause in an initiative measure directly legislating specific or exact plan changes. The voter-approved initiative in *Pala* directed the county to designate a specific area for use as a recycling collection center and solid waste facility, and further directed the county to make all necessary amendments to the general plan. Like Beek here, the initiative

opponent in *Pala* challenged the "indirect" manner in which the initiative purported to amend the general plan. *Pala* found the initiative to be sufficiently precise about its intended legislative purpose: to permit a previously impermissible land use (waste disposal) at a specific location. *Pala* found no legal requirement for initiative proponents to propose "'direct'" amendments to the zoning laws or general plan so long as "the voters said precisely how the General Plan is to be amended . . . ." (*Id.* at p. 577.) "Such enabling legislation promotes, rather than violates, the requirement that a general plan reflect an integrated and consistent document." (*Ibid.*)

Beek cites no case or statutory authority precluding a charter city from amending its general plan by adopting a charter amendment. It is well-established that general plans may be amended by initiative, and the City readily acknowledges that it must amend its general plan to conform to the new charter provision. "In other words, the freedom given charter cities to control the general plan amendment process — including the freedom, presumably, to allow amendment by initiative if the city charter so provides — belies the claim that the Legislature intended to delegate the general plan amendment authority exclusively to local governing bodies in order to fulfill the statewide objectives of the planning law." (*DeVita, supra,* 9 Cal.4th at p. 784.)

As our Supreme Court has recognized, the "most direct form" of public input in the planning process comes through the ballot box and the robust public debate that precedes it. (*DeVita, supra,* 9 Cal.4th at p. 786.) "When the people exercise their right of initiative, then public input occurs in the act of proposing and circulating the initiative itself, and at the ballot box. We cannot conclude that, for the sake of eliciting public involvement, the Legislature intended to preclude this more direct form of public participation." (*Id.* at p. 787.)

D. *The Voters' Approval of Measure B Was Not Impermissibly Tainted by a Misleading Ballot Title or the Failure to Include Its Full Text*

As a final basis for invalidating Measure B, Beek argues that the ballot language failed to provide the voters with enough information to make an informed decision. Beek says the ballot title, "City Hall in the Park Initiative," bestowed an unfair advantage on the proponents, and the ballot omitted the full text of the measure. According to Beck, "Measure B's biased title, combined with its failure to include the full text of the measure, its failure to ensure that voters knew that they would be losing some parkland, and its failure to identify which sections of the General Plan and Municipal Code were to be modified, created a confusing and imbalanced election."

The ballot title is neither false, misleading nor partial to any side. As the Court of Appeal recently stated in *Martinez v. Superior Court* (2006) 142 Cal.App.4th 1245, in deferring to a city council's ballot title for a proposed charter amendment: "To comply with the election statutes, the ballot title need not be the 'most accurate,' 'most comprehensive,' or 'fairest' that a skilled wordsmith might imagine. The title need only contain words that are neither false, misleading, nor partial. The title adopted by the city council meets that standard, and the judiciary is not free to substitute its judgment given its deferential standard of review. [Citation.]" (*Id.* at p. 1248.)

Unlike the ballot title in *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1225 (asking whether voters wanted to approve an ordinance "'to provide revenue . . . , create jobs, provide for [hiking trail], and allow . . . waterfront access'"), the title "City Hall in the Park Initiative" provided no signal to the voters of how they should vote. (Beek's own committee opposing Measure B was called "Committee Opposed to Measure to Build City Hall in Newport Center Park.") The ballot title was immediately followed by this question: "Shall the City of Newport Beach Charter be amended to require City Hall, city administrative offices and related parking to be located on City property which is bounded by Avocado Avenue on the west, San

Miguel Drive on the north, and MacArthur Boulevard on the east, and Newport Beach Central Library on the South?" The ballot title and question neither promoted nor disparaged any side.

Beek has provided no statutory or case authority for his proposition that each individual ballot must include the full text of an initiative measure, and we do not further consider the matter.

III

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.